APPENDIX A

Memorandum Decision of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, July, 1976.

43 STATE DIVISION OF HUMAN RIGHTS, Respondent, v CARNATION et al., Petitioners.—Determination unanimously annulled, without costs, and determination of Division of Human Rights confirmed. Memorandum: This appeal presents a question, which in recent years has generated a spate of lawsuits, particularly in the Federal courts, relating to the right of an employee to demand that his employer grant him time off for religious observances. In large measure, determinations in this area turn on particular fact situations. Complainant-respondent Daryl Clarke in September, 1971, more than four years after he began his employment with petitioner Carnation Company (employer), converted to the religion of Seventh Day Adventist. He informed his employer that because of his religious beliefs he would not work on Saturdays. The employer took steps to accommodate him by switching days off in a manner not in keeping with the normal established plant operation. Despite problems with other employees because of the method of accommodation the employer permitted complainant to arrange with two other employees to work on Saturdays in complainant's place. In July, 1973 the employer was informed by the local union that the two employees did not desire to and would no longer work Saturdays for complainant. The employer offered another job which would not require complainant to work on Saturdays, but which paid less than he had been earning. Employer advised complainant that by transferring to the general labor classification he would suffer no loss of seniority rights

or other fringe benefits with exception of the reduction in pay. The new job would pay $3.13 per hour rather than $3.63 which complainant was earning. Complainant accepted the new job classification but filed a complaint with the State Division of Human Rights, claiming that the employer had unlawfully discriminated against him by reason of his religion. An investigation was made by the division which determined that it found no probable cause to believe that the employer was engaging in the unlawful practice complained of and it dismissed the complaint. Complainant appealed the dismissal order to the State Appeal Board. The board found that the division's order of dismissal was "arbitrary, capricious and an unwarranted exercise of discretion" and it reversed and vacated the division's order. The board further held "that there is probable cause to believe that the respondents have engaged in the unlawful discriminatory practice complained of" and remanded the matter to the division for further proceedings. Section 296 (subd 10, par [a]) of the Executive Law provides: "It shall be an unlawful discriminatory practice for any employer to prohibit, prevent or disqualify any person from, or otherwise to discriminate any person in, obtaining or holding employment, because of his observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his religion." The record establishes that the employer did not violate the provisions of paragraph [a] of subdivision 10. There is substantial evidence that the employer made every reasonable effort to accommodate complainant and to allow him to continue in his employment. The division properly determined that the employer did nothing "to prohibit, prevent or disqualify [complainant] or otherwise

to discriminate against [him] in obtaining or holding employment, because of his observance *** of his religion". He was permitted to continue in employment and has been continuously employed. The finding of the division of no probable cause was supported by substantial evidence and cannot be characterized as "arbitrary and capricious" (*Matter of Holland v Edwards*, 307 NY 38, 44). The Executive Law properly obliges employers to make reasonable accommodations to meet the religious needs of their employees. Such accommodations should not work an undue hardship which would jeopardize the financial existence of the employer. The employer here is dealing with a product of extremely perishable nature. Production schedules must be rigidly adhered to in processing milk. Notwithstanding this fact, the employer made every effort to co-operate with the complainant and did so until circumstances prevented it from continuing the work schedules which had existed for two years. Admittedly, complainant has suffered a reduction of 50 cents per hour in his wages. Regretable as this is, the employer suggests that this is the economic sacrifice complainant, if he is to remain in his present employment, must make in exercising his religious beliefs. There is no evidence in this record that the employer's "decision was in fact actuated by discrimination against creed" (*Matter of Eastern Greyhound Lines Div. of Greyhound Lines v New York State Div. of Human Rights*, 27 NY2d 279, 283). On the record before us the division properly determined the matter and its determination should be confirmed. (Proceeding pursuant to Executive Law, §298.) Present—Marsh, P.J., Moule, Simons, Goldman and Witmer, JJ.

APPENDIX B

Memorandum Decision of State of New York, Court of Appeals.

STATE DIVISION OF HUMAN RIGHTS, Appellant v CARNATION COMPANY et al., Respondents

Argued May 2, 1977; decided June 7, 1977

Civil rights—discrimination because of religious beliefs.

State Div. of Human Rights v Carnation Co., 53 AD2d 1053, reversed.

APPEAL from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered July 12, 1976 in a proceeding pursuant to section 298 of the Executive Law, which (1) annulled an order of the State Human Rights Appeal Board (a) reversing an order of the State Division of Human Rights which dismissed a complaint charging respondents with an unlawful discriminatory practice, and (b) finding that there was probable cause to believe respondents engaged in unlawful discriminatory practices, and (2) reinstated the order of the State Division of Human Rights. Complainant was employed as a labeler operator for respondent Carnation Company. Shortly after being promoted to that position complainant was baptized into the Seventh Day Adventist Church and informed his employer that because of his religious beliefs he would not be able to work Saturdays. Thereafter the employer attempted to switch complainant's days off in order to accommodate his religious beliefs but discontinued that practice when a grievance was filed by a fellow employee of complainant. The employer then permitted complainant to arrange a schedule with other labeler operators whereby

they worked on the Saturdays complainant would ordinarily work. This arrangement continued from September of 1971 until July of 1973, when the local union informed the employer that the other employees would no longer substitute for complainant. The employer then transferred complainant to a lower paying job classification, which complainant accepted under protest, and he then filed a complaint with the State Division of Human Rights. The State Human Rights Appeal Board found that the State Division of Human Rights' dismissal of the complaint was arbitrary, capricious and an unwarranted exercise of discretion. The Appellate Division concluded that the division's decision was supported by substantial evidence and was not arbitrary and capricious.

Alan J. Saks and *Beverly Gross* for State Division of Human Rights, appellant.

A. Terry Van Houten, Warren L. Johns, Walter E. Carson and *James A. Spitz, Jr.*, for Daryl Clarke, appellant.

H. Kenneth Schroeder, Jr., for respondents.

MEMORANDUM. Order of the Appellate Division reversed, order of the Human Rights Appeal Board reinstated, and the case remitted to the Division of Human Rights for an evidentiary hearing. Section 296 (subd 10, par [a]) of the Executive Law prohibits discrimination in employment based on a person's "observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his religion". The statutory pro-

hibition does not apply, however, "where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer" (Executive Law, §296, subd 10, par [c]).

The record in this case is not sufficiently developed to determine, as a matter of law, whether retaining complainant in his former position would have resulted in undue economic hardship to the employer. If, as the employer contends, designating a qualified substitute for complainant's Saturday shift would entail any significant increase in costs, that would be enough to establish undue hardship. It should be obvious that an undue economic hardship does not require any threat or undermining of the economic stability of an enterprise. It would be enough that a palpable increase in costs or risk to industrial peace would be required in order to accomplish the end sought by the employee. But, without an evidentiary hearing, it cannot be determined definitively whether the employer could have accommodated appellant's schedule without such significant cost or risk.

Chief Judge BREITEL and Judges GABRIELLI, JONES, WACHTLER, FUCHSBERG and COOKE concur; Judge JASEN dissents and votes to affirm on the memorandum at the Appellate Division (53 AD2d 1053).

Order reversed, with costs, order of the Human Rights Appeal Board reinstated, and the case remitted to the Appellate Division, Fourth Department, with directions to remand to the Division of Human Rights for further proceedings in accordance with the memorandum herein.

APPENDIX C

Decision of the Commissioner of the New York State Division of Human Rights.

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS
on the complaint(s) of
DARYL CLARKE,

Complainant.

- against -

CARNATION COMPANY AND SUPERINTENDENT, GARY JORDAN,

Respondents.

- and -

TRUCK DRIVERS AND HELPERS UNION LOCAL NO. 649,

Necessary Party.

Case No.(s) CRF-31614-73

NOTICE OF ORDER AFTER HEARING

PLEASE TAKE NOTICE that the within is a true copy of an Order issued herein by Werner H. Kramarsky, Commissioner of the State Division of Human Rights, after a hearing held before Administrative Law Judge Rose Ferrandina, Esq. In accordance with the Division's Rules of Practice, copies of this Order have

been filed in the offices maintained by the Division at 2 World Trade Center, New York, New York 10047, and at 69 Delaware Avenue, Buffalo, New York 14202. The Order may be inspected by any member of the public during the regular office hours of the Division.

PLEASE TAKE FURTHER NOTICE that in accordance with Section 297-a of the New York State Human Rights Law, any party to this proceeding may appeal this Order to the State Human Rights Appeal Board by filing with the Board a written notice of appeal within fifteen (15) days after service of this Order. The notice of appeal must be filed by mail or in person at the office of the State Human Rights Appeal Board, Room 8234, 2 World Trade Center, New York, New York 10047. DO NOT FILE NOTICE OF APPEAL WITH THE STATE DIVISION OF HUMAN RIGHTS. The Division and the Board are separate agencies. A notice of appeal delivered to or received by the Division, or any agency other than the Board, shall be deemed improperly filed and shall be dismissed by the Board.

DATED: JUN 18 19(illegible)

NEW YORK, NEW YORK

STATE DIVISION OF HUMAN RIGHTS

WERNER H. KRAMARSKY
COMMISSIONER

Appendix C—Decision of the Commissioner of the New York State Division of Human Rights.

TO:

Mr. Daryl Clarke
R.D. #2, Dye Road, Box 130
South Dayton, New York 14138

Carnation Company
First Avenue
South Dayton, New York 14138

Mr. Henry Snapper, Supervisor
Corporate Labor Relations
Carnation Company
5045 Wilshire Boulevard
Los Angeles, California 90036

Mr. Gary Jordan, Superintendent
Carnation Company
First Avenue
South Dayton, New York 14138

Harris, Beach, Wilcox, Rubin
& Levey, Esqs.
A. Terry Van Houten, Esq. and James Spitz, Esq.,
of Counsel
2 State Street
Rochester, New York 14614

Hodgson, Russ, Andrews, Woods
& Goodyear, Esqs.
H. Kenneth Schroeder, Jr., Esq., of Counsel
1800 One M & T Plaza
Buffalo, New York 14203

Appendix C—Decision of the Commissioner of the New York State Division of Human Rights.

Truck Drivers and Helpers Union Local #649
102 East Main Street
Falconer, New York

James E. Crotty, Esq.
1106 Chemical Bank Building
Buffalo, New York 14202

Ann Thacher Anderson, Esq., General Counsel
Elaine Berger, Esq., of Counsel
State Division of Human Rights
2 World Trade Center
New York, New York 10047

Hon. Robert Abrams
Attorney General
2 World Trade Center
New York, New York 10047

Appendix C—Decision of the Commissioner of the New York State Division of Human Rights.

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE DIVISION OF HUMAN RIGHTS

STATE DIVISION OF HUMAN RIGHTS
on the complaint(s) of
DARYL CLARKE,

Complainant,

- against -

CARNATION COMPANY AND SUPERINTENDENT, GARY JORDAN,

Respondents,

- and -

TRUCK DRIVERS AND HELPERS UNION LOCAL NO. 649,

Necessary Party.

Case No.(s) CRF-31614-73

PROCEEDINGS IN THE CASE

On the 16th day of October, 1973, the above-named Complainant filed a verified complaint, thereafter amended, with the State Division of Human Rights (hereinafter the "Division") charging the above-named Respondents with unlawful discriminatory practices relating to employment, in violation of the Human Rights Law (Executive Law, Article 15) of the State of New York.

Appendix C—Decision of the Commissioner of the New York State Division of Human Rights.

On October 25, 1974, a determination was issued by the Division which found that "there is no probable cause to believe that the respondents engaged in or was engaging in the unlawful discriminatory practice complained of."

On Complainant's appeal, the State Human Rights Appeal Board on June 30, 1975 reversed the aforesaid determination and found that probable cause existed to believe that Respondents had engaged in an unlawful discriminatory practice and remanded the case to the Division for a public hearing on the complaint.

The decision and order of the Board were appealed by Respondents to the Appellate Division of the Supreme Court, Fourth Department, and by order dated July 12, 1976, the Appellate Division reversed the Board's decision and thereby ordered the original determination of "no probable cause" reinstated and the complaint dismissed. *State Division of Human Rights v. Carnation Company*, 53 A.D.2d 1053.

An appeal of the Appellate Division's decision was taken and the Court of Appeals, in a Memorandum Decision dated June 7, 1977, reversed the order of the Appellate Division, reinstated the order of the State Human Rights Appeal Board and remitted the case to the Appellate Division, with directions to remand to the Division of Human Rights for further proceedings in accordance with the memorandum, 42 N.Y.2d 873.

Thereupon, after investigation, the Division found that it had jurisdiction over the complaints and that probable cause existed to believe that Respondents had engaged

in an unlawful discriminatory practice. The Division thereupon referred the case to public hearing.

After due notice, the case came on for a hearing before Rose M. Ferrandina, Esq., an Administrative Law Judge of the Division. The hearing was held on February 15, April 6, April 7, May 18, June 22 and October 19, 1978.

Complainant appeared at the hearing and was represented by Harris, Beach, Wilcox, Rubin & Levey, Esqs., by Terry Van Houten, Esq., and James Spitz, Jr., Esq., of Counsel. Respondents appeared and were represented by Hodgson, Russ, Andrews, Woods & Goodyear, Esqs., by Kenneth Schroeder, Jr., Esq., of Counsel.

The Division was represented by Ann Thacher Anderson, Esq., General Counsel, by Elaine Berger, Esq., of Counsel. Truck Drivers and Helpers Union, Local No. 649, which was joined as a necessary party by the Administrative Law Judge on motion of Divison's counsel, appeared by James Crotty, Esq.

The transcript of the final hearing was received on November 13, 1978. Complainant's post hearing brief was received on January 4, 1979, and Respondents' was received on January 10, 1979.

FINDINGS OF FACT

1. Complainant Daryl Clark began his employment with Respondent Carnation Company (hereinafter "Carnation") on or about April 7, 1967 at Carnation's South Dayton plant. Carnation is engaged in the business of canning of evaporated milk, and the South Dayton location is the only one of its seven plants located in New York State.

2. On or about September 25, 1971, Complainant became a member of the Seventh Day Adventist Church, and from that date to the present, he has observed the period from sundown Friday to sundown Saturday as the Sabbath, in accordance with the tenets of his religion.

3. After his conversion to the Seventh-Day Adventist religion, Complainant, who held the position of Labeler Operator, Bracket I, (there were three such positions in the plant), informed his supervisors Mr. Bill Cook and Mr. Robert Killroch that he could no longer work on his Sabbath, but that he would be available for work on any other day, including Sunday.

4. The canning production process at South Dayton is a continuous "line" operation which runs, as a general rule, on Monday, Tuesday, Thursday, Friday and Saturday. Functions, such as maintenance of equipment, are performed at the plant on Wednesdays and Sundays. Carnation at present employs approximately twenty-one hourly employees in its canning operation, covering two shifts. Hourly employees such as Complainant, at all times herein pertinent, were covered by collective bargaining agreements between Carnation and Truck Drivers and Helpers Union, Local Union No. 649, named as a Necessary Party in this case (hereinafter "Local 649").

5. The collective bargaining agreements in question contain the following language: "The normal work week will be forty (40) hours in five (5) days, Monday through Sunday." "So far as possible relief days shall be rotated. Employees shall receive two (2) days off each week ex-

cept in unavoidable emergencies." The rotation of relief days in accomplished according to the employees' shift in a given week. There are two shifts and the prevailing work practice is that an employee who is assigned to the early shift in a given week, shall have Saturday and Sundays off. Employees switch shifts on a weekly basis and shift selection and rotation of relief days are not governed by seniority.

6. After Complainant informed his supervisors that he would no longer work on his Sabbath, the other two Labeler Operators, Mike Blair and David Clark, "covered" for Complainant on a temporary basis on Saturdays, that is they worked in Complainant's place when Complainant was scheduled to work on his Sabbath.

7. On or about November 27, 1971, Frank Willson, a Can Forker—Boxer Operator, Bracket II, filed a union "grievance" in which he complained that he was being denied his Saturday and Sunday off in a week when he worked the "early" shift and Complainant worked the "late" shift. I accept the testimony of Respondent Gary Jordan, who became Superintendent of the Dayton Plant in or about September, 1973, that at the time in question, Complainant would normally fill in for the Boxer Operator (in this case Mr. Willson). Since Complainant was not working on his Sabbath, Mr. Willson was not receiving his Saturday off on the rotating basis described in paragraph five of this Order. The grievance was resolved by the Respondents by using David Weaver, another Can Forker—Boxer Operator, to fill in for Mr. Willson. No other employees, including a third Boxer

Operator whose schedule was also affected by Complainant's not working on Saturday, filed any union grievances.

8. Shortly after the Willson grievance was so resolved, Complainant entered into a voluntary arrangement with the other two Labeler Operators in which they agreed that they would work in Complainant's place as Labelers when Complainant was scheduled to work on his Sabbath. This arrangement continued until July, 1973, when the two Labeler Operators informed Respondent they would no longer work on Saturdays in place of Complainant.

9. By letter dated July 5, 1973, Carnation, by its superintendent J. W. Cooke, stated to Complainant three alternative ways by which Carnation could arrange for Complainant to observe his Sabbath:

> (1) put Complainant into a Bracket III general labor position (this would involve a 50 cents per hour decrease in pay) or
>
> (2) terminate his employment.
>
> (3) create a fourth Labeler Operator job and appoint an individual to fill it who would work in that capacity on Saturdays only and a lower bracket job the remaining four days of the week.

Carnation indicated in this letter it would not undertake alternative 3 as "it is not economical to pay an employee for 40 hours per week at Bracket I pay and only receive 8 hours Bracket I work." The collective bargaining agreements previously referred to provide "[i]f an employee spends over fifty percent (50%) of his time on a

higher rated job for thirty (30) consecutive scheduled work days, except for relief due to vacations, sickness or injury, he shall be reclassified to the rate schedule of the higher rated job."

10. Complainant was scheduled by Carnation to work as a Labeler on Saturday, July 7, 1973. After Complainant absented himself from work on that day, in order to observe his Sabbath, he was notified by Respondent by letter dated July 9, 1973, that he faced disciplinary action, "including the possibility of termination." Complainant was directed "to report to work as scheduled unless a reasonable excuse was given to your supervisor in advance of your absence."

11. Shortly thereafter, Complainant communicated with Frank Harvey, Business Representative for Local 649, concerning the alternatives posed by Carnation in its letter of July 5, 1973. Mr. Harvey, by letter dated July 17, 1973 advised Complainant that "to me number two or three seem to be the best solution *** my advice to you is to choose one of the three alternatives proposed by the Company."

12. On or about August 3, 1973, Complainant again advised Respondents that he would not work as a Labeler on Saturday, August 4, 1973 as scheduled, or any other Saturday. Shortly thereafter, Complainant, perceiving that he would be dismissed from the Labeler's position if he did not report on August 4th, accepted, under protest, a demotion from the Labeler's position to a position of General Laborer, Bracket III, which paid 50 cents per hour less. The laborer's position, which involved janitorial duties, was a Monday to Friday job which did not require Saturday work.

13. Complainant remained in the position of laborer until about September, 1976, when he bid for and was awarded a position of Warehouseman, a Bracket II position paying an hourly rate of 25 cents an hour less than the Bracket I Labeler Operator. Complainant has remained in the Warehouseman's position from that time to the present. There are three employees in the Warehouseman's position and they are normally scheduled for Saturday work in accordance with the same contractual rotation schedule governing Labeler Operators. Carnation has, since September 15, 1976, been substituting another person to work in Complainant's place on those Saturdays when he would, normally under the rotating system, have been scheduled to work. There is no evidence that any employee affected thereby has filed a grievance alleging violation of the bargaining agreement.

14. In September, 1977, Complainant was offered that position by Respondents on the condition that he work on Saturday, when scheduled, an offer which Complainant declined.

15. From August, 1978 and up to and including the last hearing date of October 19, 1978, the South Dayton plant operated with only two Labeler Operator positions filled. During this three month period, Respondent has used "relief operators" to work in place of both Labeler Operators on a Saturday. No employee has filed a grievance alleging this constituted a breach of the collective bargaining agreement.

16. The South Dayton plant projects the number of hours that a Labeler Operator will be working one year

in advance. Rarely do variations have to be made in those projections. Respondents may use other employees, not necessarily those denominated as "relief men," to replace Labelers as long as those individuals are qualified for this position, which requires approximately two to three weeks of training.

17. Complainant is the only employee at the South Dayton Plant who is a Sabbath Observer.

OPINION

1. The Human Rights Law Section 296.10 is a legislative reaffirmation of the right of every person in this State to obtain and hold employment free from discrimination because of his religion and, in accordance with this policy, no individual can be prohibited, prevented or disqualified from, or discriminated against in obtaining or holding employment because of the observance of his Sabbath or other holy days in accordance with his religion. It was the intention of the legislature that this act "be construed liberally to effectuate the purposes for which it was enacted." (Laws of 1967, Chapter 667, Section 1).

2. Paragraph (a) of Section 296.10 contains a broad and seemingly absolute prohibition against discrimination in employment because of an employee's, or potential employee's observance of any particular day as his Sabbath.

3. Under paragraphs (b) and (c) of Section 296.10, an employer is not required to accommodate an employee in cases of emergency or where that person's presence is in-

dispensable to the orderly transaction of business; or if that person holds a position dealing with health or safety and that person must be available whenever needed; or if the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer.

4. Respondents contend they have not violated Section 296.10 because Complainant, although demoted to a lower paying job, has been continuously employed by Respondents. I find that such an interpretation of the statute would permit the economic coercion and hardship upon Sabbath observers that the enactment of Section 296.10 was enacted to prevent.

5. Respondent Carnation's actions in August, 1973, as a result of which Complainant was faced with the prospect of being terminated from his position as a Labeler unless he agreed to work on his Sabbath, left Complainant with no alternative other than to accept the lesser job of Laborer, which he did under protest.

6. I find that Respondent Carnation violated Section 296.10(a) by demoting Complainant to the lower paying job in August, 1973 and preventing him from continuing in his position as Labeler from that time to the present. However, since Respondent Gary Jordan did not become superintendent until September, 1973, he is in no way responsible for such violation.

7. Respondents further contend that Complainant is not entitled to the protection of Section 296.10 (a) because to retain Complainant in his former position would have resulted in undue economic hardship to the employer as provided for in Section 296.10 (c).

8. In the prior proceeding wherein the New York Court of Appeals directed that this matter be remanded to the Division, the Court in its memorandum decision held:

> "The record in this case is not sufficiently developed to determine, as a matter of law, whether retaining complainant in his former position would have resulted in undue economic hardship to the employer. If, as the employer contends, designating a qualified substitute for complainant's Saturday shift would entail any significant increase in costs, that would be enough to establish undue hardship. It should be obvious that an undue economic hardship does not require any threat or undermining of the economic stability of an enterprise. It would be enough that a palpable increase in costs or risk to industrial peace would be required in order to accomplish the end sought by the employee. But without an evidentiary hearing, it cannot be determined definitely whether the employer could have accommodated appellant's schedule without such significant cost or risk." (State Division of Human Rights v. Carnation Co., 42 N.Y.2d 873 (1977)).

9. In the instant proceedings Carnation presented as its sole witness, Respondent Gary Jordan, the Dayton plant Superintendent since September, 1973. Although it is Mr. Jordan's opinion that placing Complainant in the position of Labeler Operator and allowing him to observe his Sabbath would have a noticeable adverse effect on Carnation's costs, and although Respondents offered in evidence a series of blank forms (Respondent's Exhibits J1 through J17) to show that Carnation keeps detailed and comprehensive records which measure costs, no ac-

tual cost data as to the possible methods of employing Complainant while allowing him to observe his Sabbath was presented by Respondents.

10. Respondents argue that if they were required to use lesser classified employees to fill in for Complainant on his Sabbath, such employees would, under the prevailing collective bargaining agreements, be entitled to be paid the prevailing wage of the higher classified Labeler position, thereby causing an increase in labor costs.

11. The provision in question provides, "if an employee spends over fifty percent (50%) of his time on a higher rated job for thirty (30) consecutive scheduled work days, except for relief due to vacations, sickness or injury, he shall be reclassified to the rate schedule of the higher rated job."

12. No attempt was made by Respondents to show, and it is inconceivable to me, that accommodating Complainant on his Sabbath by substituting a lesser classified employee in his place, would involve a substitution for thirty *consecutive* work days. This argument is further belied by the fact that Respondents have been able to substitute other employees, including those of a lower classified pay grade, for Complainant in his position as Warehouseman when his schedule requires Saturday work, without apparently violating the collective bargaining agreement.

13. Respondents further contend that to grant Complainant the relief he seeks would cause a significant risk to industrial peace, since the bargaining agreements, as relating to rotation of relief days, (as cited in finding 5 of

this order) would be violated thereby causing the filing of employee grievances. This conclusion is belied by the evidence presented. As outlined in finding 13 of this order, Complainant as a Warehouseman, has, since October, 1976, been allowed to observe his Sabbath, without any such repercussions. Based on the evidence in this record I agree with Complainant's contention that Respondent Carnation has the flexibility, within its collective bargaining agreement with the necessary party local 649, to place Complainant in the Labeler's position and allow him to observe his Sabbath.

14. The hearsay statements from Labeler Operator, and reliefmen employed at the plant in 1978, in evidence as Respondents' exhibit K, are not probative of whether those employees might voluntarily work for Complainant on an occasional basis in the position of Labeler Operator on his Sabbath, since the supervisor who obtained these statements was not called as a witness, nor was Mr. Jordan present when they were secured and he testified he had no knowledge as to what conversation occurred between these employees and the supervisor who obtained them. The possibility of adverse employee reaction is not a statutory exception that Respondent can rely upon as justification for its failure to comply with the Human Rights Law.

15. Respondents argue that the United States Supreme Court's decision in the matter of *Hardison v. Trans World Airlines*, 432 U.S. 63 1977) concerning Sabbath observance is controlling upon this proceeding. I do not agree. It would appear that the *Hardison* decision was decided under Title VII of the federal Civil Rights

Act of 1964, (42 U.S.C. Section 2000 e *et seq.*), a general statute without specific reference to Sabbath observance. That statute also insulates, by specific provision, bona fide seniority rights created by collective bargaining agreements, and such seniority rights were a factor in the *Hardison* case, (42 U.S.C. Section 2000 e-2(h)). The New York law contains no such insulating provision. Moreover, in the instant proceeding it would appear that seniority rights are not involved; Complainant's seniority as compared to other employees was never presented as an issue.

16. I find that Complainant's personal presence on his Sabbath was not required for emergencies nor indispensable to the orderly transaction of Respondent Carnation's business.

17. I further find that Respondent Carnation did not sustain the burden of proof required by Section 296.10(c) to show that "the uniform application of terms and conditions of attendance to employees is essential to prevent undue hardship to the employer."

18. Respondent Carnation could have scheduled Complainant to work on days and times so as to permit him to work as a Labeler Operator and observe his Sabbath.

DECISION

On the basis of the foregoing, I find that Respondent Carnation, but not Respondent Jordan, discriminated against Complainant in violation of the Human Rights Law by requiring him to accept a demotion so that he could observe his Sabbath.

On the basis of the foregoing, I further find that the awarding of compensatory damages to the aggrieved Complainant will effectuate the purposes of the Human Rights Law.

ORDER

Based upon the foregoing Findings of Fact and pursuant to the Human Rights Law, it is hereby

ORDERED, that the complaint against Respondent Gary Jordan be, and the same is hereby dismissed; and it is further

ORDERED, that the Respondent Carnation, its agents, representatives, employees, successors and assigns shall cease and desist from prohibiting, preventing or disqualifying Complainant or any other person from, or otherwise discriminating against Complainant or any person in, obtaining or holding employment in the terms, conditions and privileges of employment, because of their observance of any particular day or days or any portion thereof as a Sabbath or other holy day in accordance with the requirements of their religion; and it is further

ORDERED, that the Respondent Carnation, its agents, representatives, employees, successors and assigns shall take the following affirmative action which will effectuate the purposes of the Human Rights Law:

1. Respondent Carnation shall forthwith offer Complainant a position as a Labeler Operator permitting Complainant to work on days and shifts which would not

require him to be present on his Sabbath or other holy days. Complainant shall be allowed ten (10) business days in which to accept or reject the said offer.

2. Respondent Carnation shall, within thirty (30) days from the date hereof, pay to Complainant as back pay, a sum of money based on the difference between what Complainant would have earned as a Labeler Operator from August 4, 1973 to the date Complainant either accepts or rejects the offer of employment, less withholding and usual deductions, and the sums actually earned by Complainant during this period. Said payment shall bear interest at the rate of six percent (6%) per annum and the interest shall be computed from a reasonable intermediate date, in accordance with Section 5001 (b) of the CPLR. Said intermediate date shall be the date computed by taking the middle date from August 4, 1973 to the date that the Complainant accepts or rejects the Respondent Carnation's offer. Respondent Carnation shall furnish proof of payment within ten (10) business days thereof to the State Division of Human Righs, Attention Ann Thacher Anderson, Esq., General Counsel, 2 World Trade Center, New York, New York 10047.

3. Respondent Carnation shall grant Complainant all the rights, privileges, benefits, seniority and pay raises he would have received or been entitled to receive had he not been demoted on August 4, 1973.

4. Respondent Carnation shall instruct in writing all of its appointing personnel, supervisory employees, officers, agents and Local 649 that no person may be barred from employment and that no retaliatory action may

be taken against any employee who refuses to work on his Sabbath or other holy days in accordance with the requirements of his religion.

5. Respondent Carnation shall make available to the duly-authorized representatives of this Division such information and documents as may be necessary for the Division to ascertain whether there is compliance with this Order.

DATED: JUN 18 1979
NEW YORK, NEW YORK

STATE DIVISION OF HUMAN RIGHTS
WERNER H. KRAMARSKY
COMMISSIONER

APPENDIX D

Order of the New York State Human Rights Appeal Board.

NOTICE OF ORDER

STATE OF NEW YORK
Executive Department

STATE HUMAN RIGHTS APPEAL BOARD
Two World Trade Center—25th Floor
New York, N.Y. 10047
Tel: 488-2038 (area code 212)

To:
All Parties to this Proceeding—APPEAL NO. 5881

PLEASE TAKE NOTICE that herewith attached is the Order of the State Human Rights Appeal Board.

ANY COMPLAINANT, RESPONDENT OR OTHER PERSON AGGRIEVED BY THIS ORDER MAY OBTAIN JUDICIAL REVIEW THEREOF. *Such proceeding shall be brought in the Appellate Division of the Supreme Court of the State in the appropriate judicial department WITHIN 30 DAYS OF SERVICE OF THIS ORDER.* (See Section 298, Human Rights Law.)

Attachment:

Appendix D—Order of the New York State Human Rights Appeal Board.

ORDER

STATE OF NEW YORK: EXECUTIVE DEPARTMENT
STATE HUMAN RIGHTS APPEAL BOARD

STATE DIVISION OF HUMAN RIGHTS
on the complaint of DARYL CLARKE,
Complainant-Respondent,

vs.

CARNATION COMPANY,
Respondent-Appellant,

and

GARY JORDAN,
Respondent-Appellant,

and

TRUCK DRIVERS AND HELPERS UNION
LOCAL NO. 649,
Necessary Party.

Case No. CRF-31614-73.
Appeal No. 5881.
Argued: Sept. 19, 1979.

PRESIDING: Honorable Richard Wong.

Appearances:

H. Kenneth Schroeder, Jr., Esq. on behalf of Respondent-Appellant.

James A. Spitz, Jr., Esq. on behalf of Complainant-Respondent.

E. Joseph Giroux, Jr., Esq., on behalf of Necessary Party.

Appendix D—Order of the New York State Human Rights Appeal Board.

The above-entitled appeal having been timely filed with this Board, and the Board having reviewed and considered the entire record on appeal herein, and the Board having discharged its narrowly prescribed review function pursuant to Section 297-a(7) of the Human Rights Law as construed by the Court of Appeals in *300 Gramatan Avenue Associates* v. *State Division of Human Rights*, 45 N.Y.2d 176, and

A majority of the Board having decided that the Order appealed from herein is supported by substantial evidence on the record taken as a whole, it is

ORDERED that the Decision and Order of the Commissioner of the State Division of Human Rights be and the same hereby is in all respects affirmed.

STATE HUMAN RIGHTS
APPEAL BOARD
By IRMA VIDAL SANTAELLA
Irma Vidal Santaella
Chairman

Dated and Mailed: February 18, 1981.
TO: (See list attached)

Appendix D—Order of the New York State Human Rights Appeal Board.

STATE HUMAN RIGHTS APPEAL BOARD
APPEAL NO. 5881

DISTRIBUTION LIST

RESPONDENT-APPELLANT

Carnation Company
First Avenue
South Dayton, New York 14138

Att: Mr. Gary Jordan,
Superintendent

Carnation Company
5045 Wilshire Boulevard
Los Angeles, California 90036

Att: Mr. Henry Snapper,
Supervisor Corporate Labor Relations

Truck Drivers and Helpers
Union Local #649
102 East Main Street
Falconer, New York

Hodgson, Russ, Andrews,
Woods & Goodyear, Esqs.
1800 One M & T Plaza
Buffalo, New York 14203

Att: H. Kenneth Schroeder, Jr., Esq.

James E. Crotty, Esq.
1106 Chemical Bank Building
Buffalo, New York 14202

Appendix D—Order of the New York State Human Rights Appeal Board.

COMPLAINANT-RESPONDENT

Mr. Daryl Clarke
R.D. #2, Dye Road, Box 130
South Dayton, New York 14138

Harris, Beach, Wilcox,
Rubin & Levey, Esqs.
2 State Street
Rochester, New York 14614
Att: A. Terry Van Houten, Esq.

James A. Spitz, Jr., Esq.

NECESSARY PARTY

E. Joseph Giroux, Jr., Esq.
McMahon & Crotty
1028 Liberty Bank Bldg.
Buffalo, N.Y. 14202

DOHR

Commissioner Werner Kramarsky
State Division of Human Rights
2 World Trade Center
New York, N.Y. 10047

Ann T. Anderson, Esq.
General Counsel
STATE DIVISION OF HUMAN RIGHTS
2 World Trade Center
New York, N.Y. 10047
ATT: Elaine Berger, Esq.

Hon. Robert Abrams
Attorney General
2 World Trade Center
New York, N.Y. 10047

APPENDIX E

Memorandum Decision of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, February, 1982.

44 STATE DIVISION OF HUMAN RIGHTS, on Complaint of DARYL CLARKE, Petitioner-Respondent, v CARNATION COMPANY, Respondent-Petitioner.—Order of enforcement unanimously granted and cross petition dismissed, without costs. Memorandum: The Court of Appeals, on a previous appeal, remitted this matter for a hearing to determine whether retaining complainant in his position, while permitting him to observe his Sabbath, would result in undue economic hardship to the employer (*State Div. of Human Rights v Carnation Co.*, 42 NY2d 873). On remission to the State Division of Human Rights, the respondent Carnation Company submitted no cost analysis to support its plant foreman's opinion that accommodating the employee would have a "noticeable effect" on Carnation's costs. The commissioner found that Carnation Company "did not sustain the burden of proof required by section 296.10(c) [of the Executive Law] to show that the 'uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer' " and that the relief complainant seeks would not cause a significant risk to industrial peace. On a review of the entire record, we determine that "there is a rational basis in it for the findings of fact supporting the agency's decision" (McCormick, Evidence [2d ed], §352, p 847, quoted in *300 Gramatan Ave. Assoc. v. State Div. of Human Rights*, 45 NY2d 176, 182; see *State Div. of Human Rights v Genesee Hosp.*, 68 AD2d 692, 703, revd *sub nom. Matter of Genesee Hosp. v State Div. of Human Rights*, 50 NY2d 917, on dissenting opn) and therefore, we sustain the orders of the agency and grant an order of enforcement. (Proceeding pursuant to Executive Law, §298.) Present—Hancock, Jr., J. P., Callahan, Denman, Boomer and Moule, JJ.

APPENDIX F

Order of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, February, 1982.

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

PRESENT: HANCOCK, *J.P.*, CALLAHAN, DENMAN, BOOMER, MOULE, *JJ.*

STATE DIVISION OF HUMAN RIGHTS
on the Complaint of DARYL CLARKE,
Petitioner-Respondent,

v.

CARNATION COMPANY,
Respondent-Petitioner.

This proceeding having duly come on to be heard before this court pursuant to Executive Law, §298, wherein petitioner, State Division of Human Rights, seeks an order enforcing its order dated June 18, 1979 and complainant Daryl Clarke having joined in said application, and the respondent, Carnation Company, by cross-petition requests that the determination and orders of the State Division of Human Rights and the Appeal Board be annulled and for other relief,

Now, upon reading and filing the petition of the State Division of Human Rights verified by Elaine Berger on June 3, 1981, the record on review, the notice of motion with proof of service thereof, the answer of complainant,

Appendix F—Order of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, February, 1982.

Daryl Clarke, dated June 16, 1981, and the answer and cross-petition of respondent, Carnation Company, sworn to June 8, 1981, and the matter having been submitted by Elaine Berger of counsel for the petitioner, State Division of Human Rights, argued by James Spitz of counsel for complainant, Clarke, and Anne Simet of counsel for respondent, Carnation Company and due deliberation having been had thereon,

It is hereby ORDERED, That the petition for an order of enforcement be and the same hereby is unanimously granted, and the order of the State Division of Human Rights dated June 18, 1979 is hereby made the order of this court and the Carnation Company is hereby directed to comply therewith and the cross-petition is dismissed, without costs.

Memorandum, which is hereby made a part hereof.

Entered: February 26, 1982.

MARY F. ZOLLER, *Clerk*.

Supreme Court,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, MARY F. ZOLLER, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this FEB 26 1982.

MARY F. ZOLLER
(Seal) *Clerk.*

APPENDIX G

Order of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, Denying Leave to Appeal to the Court of Appeals.

SUPREME COURT OF THE STATE
OF NEW YORK
Appellate Division, Fourth Judicial Department

PRESENT: HANCOCK, *J.P.*, CALLAHAN,
DENMAN, BOOMER, MOULE, *JJ.*

STATE DIVISION OF HUMAN RIGHTS
on the Complaint of DARYL CLARKE,
Petitioner-Respondent,

v.

CARNATION COMPANY,
Respondent-Petitioner.

The above named Carnation Company having duly moved before this Court for an order granting leave to appeal to the Court of Appeals from the order of this Court, entered February 26, 1982

Now, after reading and filing the affidavit of H. Kenneth Schroeder, Jr. sworn to March 29, 1982, the notice of said motion, together with proof of due service thereof upon counsel for the opposing party, the opposing affidavit of James A. Spitz, Jr. sworn to April 12, 1982 and due deliberation having been had thereon,

It is hereby ORDERED, That said motion be and the same hereby is denied.

Entered: MAY 14 1982
MARY F. ZOLLER, *Clerk.*

Appendix G—Order of State of New York, Supreme Court, Appellate Division, Fourth Judicial Department, Denying Leave to Appeal to the Court of Appeals.

Supreme Court,
Appellate Division,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, MARY F. ZOLLER, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this MAY 14 1982.

MARY F. ZOLLER
(Seal) *Clerk*

APPENDIX H

Order of State of New York, Court of Appeals, Denying Leave to Appeal.

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the sixteenth day of September A.D. 1982.

Present, HON. LAWRENCE H. COOKE,
Chief Judge, presiding.

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4 Mo. No. 662

STATE DIVISION OF HUMAN RIGHTS
on the complaint of DARYL CLARKE,
Respondent,

vs.

CARNATION COMPANY,
Appellant.

A motion for leave to appeal &c. to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

JOSEPH W. BELLACOSA
Joseph W. Bellacosa
Clerk of the Court

APPENDIX I

Statutory Provisions.

EXECUTIVE LAW 296.10(a)(b)(c)

10. (a) It shall be an unlawful discriminatory practice for any employer to prohibit, prevent or disqualify any person from, or otherwise to discriminate against any person in, obtaining or holding employment, because of his observance of any particular day or days or any portion thereof as a sabbath or other holy day in accordance with the requirements of his religion.

(b) Except as may be required in an emergency or where his personal presence is indispensable to the orderly transaction of business, no person shall be required to remain at his place of employment during any day or days or portion thereof that, as a requirement of his religion, he oberves as his sabbath or other holy day, including a reasonable time prior and subsequent thereto for travel between his place of employment and his home, provided however, that any such absence from work shall, wherever practicable in the judgment of the employer, be made up by an equivalent amount of time and work at some other mutually convenient time, or shall be charged against any leave with pay ordinarily granted, other than sick leave, provided further, however, that any such absence not so made up or charged, may be treated by the employer of such person as leave taken without pay.

(c) This subdivision shall not be construed to apply to any position dealing with health or safety where the person holding such position must be available for duty whenever needed, or to any position or class of positions the nature and quality of the duties of which are such

that the personal presence of the holder of such position is regularly essential on any particular day or days or portion thereof for the normal performance of such duties with respect to any applicant therefor or holder thereof who, as a requirement of his religion, observes such day or days or portion thereof as his sabbath or other holy day. In the case of any employer other than the state, any of its political subdivision or any school district, this subdivision shall not apply where the uniform application of terms and conditions of attendance to employees is essential to prevent undue economic hardship to the employer. In any proceeding in which the applicability of this subdivision is in issue, the burden of proof shall be upon the employer. If any question shall arise whether a particular position or class of positions is excepted from this subdivision by this paragraph, such question may be referred in writing by any party claimed to be aggrieved, in the case of any position of employment by the state or any of its political subdivisions, except by any school district, to the civil service commission, in the case of any position of employment by any school district, to the commissioner of education, who shall determine such question and in the case of any other employer, a party claiming to be aggrieved may file a complaint with the division pursuant to this article. Any such determination by the civil service commission shall be reviewable in the manner provided by article seventy-eight of the civil practice law and rules and any such determination by the commissioner of education shall be reviewable in the manner and to the same extent as other determinations of the commissioner under section three hundred ten of the education law.